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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

CURTIS D. LEAK
Petitioner,

vs.

ST. JOSEPH HOSPITAL OF JOLIET and
DR. DOUGLAS ADELMANN
Respondents

To the United States Court of Appeals
For the Seventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether this Court intended in *Kubrick v. United States,* 444 U.S. 111, to have a cause of action in a medical malpractice case accrue when a patient is dissatisfied with the treatment received even if the patient is unaware that the treatment caused the injury giving rise to the action?

2. Whether summary judgment should be granted against a party if the Court must determine whether that party acted "reasonably"?

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To the United States Court of Appeals
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PETITION FOR A WRIT OF CERTIORARI

Petitioner, Curtis D. Leak respectfully prays that a writ of certiorari issue to review the Judgment and Opinion of the United States Court of Appeals for the Seventh Circuit, entered in this proceeding on April 12, 1984.

OPINIONS BELOW

The Order of the Court of Appeals for the Seventh Circuit was entered on April 12, 1984, and appears in the Appendix. The Opinion of the United States District Court for the Northern District of Illinois, Eastern Division, was entered on April 21, 1983, and appears in the Appendix. Both the Order and the Opinion are unreported.

JURISDICTION

The Order of the Court of Appeals for the Seventh Circuit was entered on April 12, 1984, and a timely Petition for rehearing was filed. The Petition for Rehearing was denied on June 6, 1984. An application to extend the time to file this Petition by two days was filed within ninety days of that date. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

UNITED STATES CONSTITUTION, AMENDMENT 7

Trial by jury in civil cases.

In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.

ILL. REV. STAT. ch. 83, § 22.1

No action for damages for injury or death against any physician or hospital duly licensed under the laws of this State, whether based upon tort, or breach of contract, or otherwise, arising out of patient care shall be brought more than 2 years after the date on which the claimant knew, or through the use of reasonable diligence should have known, or received notice in writing of the existence of the injury or death for which damages are sought in the action, whichever of such date occurs first, but in no event shall such action be brought more than 4 years after the date on which occurred the act or omission or occurrence alleged in such action to have been the cause of such injury or death.

STATEMENT OF THE CASE

On Sunday September 24, 1978 two bones in petitioner Curtis Leak's left leg were fractured when he was tackled while returning a kick-off in a semi-professional football game in Joliet, Illinois. Mr. Leak, who was in extreme pain following the accident, was rushed by ambulance to the emergency room of St. Joseph Hospital in Joliet. There, after a delay of approximately three hours during which he complained about his lack of treatment, Mr. Leak was seen by Dr. Douglas Adelmann who said he was going to be Mr. Leak's physician. Dr. Ademann anesthesized Mr. Leak, performed a closed reduction of the fractures, and put his leg in a cast. Later that night, Mr. Leak's leg continued to hurt and his toes felt numb.

On the next day, Mr. Leak was still having pain and his toes felt numb. He told the nursing personnel and others who came to see him that he wanted to know why his toes were numb and why Dr. Adelmann would not come to see him. On Tuesday, September 26, the situation was the same. Mr. Leak's toes were numb, he was in pain, and nobody would answer any questions for him. During his deposition, Mr. Leak explained that his complaints stemmed from the fact that Dr. Adelmann had not been to see him though he was supposed to be his doctor and nobody had told him anything concerning his injury.[1]

On Wednesday, September 27, Dr. Adelmann finally came to examine Mr. Leak. At that time, Mr. Leak told Dr. Adelmann that the nurses had put him in a wheelchair, and his leg had turned numb. He also complained about Dr. Adelmann's failure to come to see him, to respond to his messages, and to tell him what was wrong with his leg. Dr. Adelmann explained to Mr. Leak that he had broken the fibula and the tibia (the two long bones in the lower part of his leg) and that he was going to "wedge" the cast. Further, he intended to set the "big bone" on Friday, September 29. During the examination, Mr. Leak did not respond to a pin prick test of his toes.

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[1] It would appear from the deposition exhibits that Mr. Leak had been visited periodically by a Dr. Eguro, Dr. Adelmann's partner, and by nurses. Mr. Leak did not recall Dr. Eguro, but did recall the nurses (Sup. Rec. p. 44, 45, 110).

His toes had turned a different color than those on his other foot, and at times he could not move them.

On Thursday, Mr. Leak again complained to the nurses that he could not find Dr. Adelmann, and that his leg hurt and his cast still felt too tight. Finally, on Friday Dr. Ademann came to see Mr. Leak and opened the cast. When the cast was taken off, Mr. Leak's foot swelled. Dr. Adelmann examined his leg and said that he was going to do a fasciotomy to relieve the pressure which had built up. On his way to the operating room, a nurse told Mr. Leak he was going to have emergency surgery.

Following the fasciotomy, Mr. Leak was in extreme pain. On Saturday, September 30, some doctors came in to see Mr. Leak. They asked why his leg was not elevated more. His leg remained numb, and later Dr. Adelmann came in to see him. At this time, Mr. Leak asked Dr. Adelmann when he could go home. Dr. Adelmann said that his release had been scheduled.

When Mr. Leak had been unable to find Dr. Adelmann earlier that week, he had spoken to Dr. Boyd who was a physician at the Miller Clinic in Charlotte, North Carolina, where Mr. Leak lived. At the time, Mr. Leak said he wanted to be transferred to the hospital at home, and there had been some conversation between Dr. Boyd and Dr. Adelmann about his returning home when he was able to travel.

On October 3, Dr. Adelmann changed the dressing on Mr. Leak's leg and removed some damaged muscle from the fracture site. On October 4, Mr. Leak was released by St. Joseph Hospital, and he was brought by ambulance to the airport and flown to Charlotte. During the trip his leg was "banged around" and had begun to bleed badly by the time he arrived in Charlotte. When he arrived, Dr. Boyd performed surgery on Mr. Leak. Dr. Boyd told him that his situation had gotten to the point where there was some dead tissue in his leg, and that his leg might have to be removed. This was not necessary, however, and Mr. Leak was treated in Charlotte for approximately three additional weeks by Dr. Boyd and other physicians. He was then released. This treatment took the form of additional surgery and a skin graft. During this time, no physician or anyone else said anything which was critical of Dr. Adelmann or St. Joseph Hospital.

By February 1979, Dr. Boyd told Mr. Leak he was coming along fine for his situation. By April 1980, Dr. Boyd told Mr. Leak that his leg had healed sufficiently to play football, although he did not recommend it. Nonetheless, Mr. Leak tried out for the Montreal Allouettes of the Canadian Football League, which allowed him to do so because they understood he was coming off an injury. He received a physical by an Allouette physician, who allowed him to try out for the team. He found it difficult to run, however, and was not asked to play with the team. Mr. Leak was given a second physical examination following the try out. During these examinations, no one said anything critical of Dr. Adelmann or St. Joseph Hospital.

In November 1980, Mr. Leak went to the Duke Medical School to consult with Dr. Frank Bassett, the Director of Sports Medicine. His purpose was to obtain more movement in his ankle. Dr. Bassett performed surgery on Mr. Leak's ankle. In addition, he told Mr. Leak that if his treatment at St. Joseph Hospital had been better, a fasciotomy would not have been required. Prior to that, no one had said anything critical of the treatment that Mr. Leak had received at St. Joseph Hospital. Further, since he had left St. Joseph Hospital no additional surgery had been necessary in the area of his broken bones.

On April 21, 1983, the District Court granted summary judgment for the defendants on the basis that the cause of action had accrued in October 1978, more than two years prior to Mr. Leak's filing suit. The Court of Appeals affirmed on April 12, 1984, without holding oral argument. A timely Petition for Rehearing was denied on June 6, 1984.

REASONS FOR GRANTING THE WRIT

1. The Decision Below Conflicts With The Rule of Law In *United States v. Kubrick* And With The Decisions Of Other Courts Of Appeals Interpreting *United States v. Kubrick.*

In *United States v. Kubrick,* 444 U.S. 111(1979), this Court faced squarely the question of when a cause of action arises in a medical malpractice case.[2] Generally, a medical malpractice cause of action accrues when the plaintiff has notice of the injury and its cause. However, in *Kubrick* the Third Circuit added the requirement that the plaintiff must also learn that his injury was negligently inflicted before accrual. Similarly, other circuits had held that accrual occurs when a plaintiff has had the opportunity to discover each element of the cause of action: duty, breach, causation and damages. *Stoleson v. United States,* 629 F.2d 1265, 1268 n.3 (7th Cir. 1980).

In *Kubrick,* this Court reined in the excesses of these circuits holding that a cause of action accrues when a plaintiff discovers both his injury and its cause. *United States v. Kubrick, supra* at 120. Put another way, this Court said that a cause of action accrues when a plaintiff is "in possession of the critical facts that he has been hurt and who has inflicted the injury". *Id.,* at 122.

The rationale for this two-part test was straightforward. Once a plaintiff knew of the injury and who had done it, he or she could consult with a physician or other professional to determine whether malpractice existed. If there was malpractice, there was a violation of the standard of care; if there was a

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[2] *Kubrick* dealt specifically with the Federal Tort Claims Act under which a cause of action accrues when a claimant has discovered, or in the exercise of reasonable diligence should have discovered, the acts constituting the alleged malpractice. *Id.,* at 115. This petition arises under Ill. Rev. Stat. ch. 83, s. 22.1 (1981), which provides that the accrual of an action occurs when the claimant knew, or through the use of reasonable diligence should have known, of the injury for which damages are sought. Both the FTCA and the Illinois statute are identical in import, and the Illinois Supreme Court has utilized this Court's language in *Kubrick* to explain the Illinois statute. *Witherell v. Weimer,* 85 Ill. 2d 146, 421 N.E.2d 869 (1981).)

violation of the standard of care, any reasonably competent doctor could so inform the plaintiff. *Id.*, at 122.

Kubrick dealt with an abnormal and unexpected sequela, however, the development of deafness after a leg infection had been treated. Nine months after Mr. Kubrick's treatment, a doctor informed him that his deafness resulted from the treatment of his leg with an antibiotic. At that point, this Court held the cause of action accrued as Mr. Kubrick had knowledge of his injury (deafness) and its cause (the treatment of his leg with an antibiotic).

The criteria laid down in *Kubrick* are equally applicable to the case of Mr. Leak, although their application requires a somewhat more sophisticated analysis since the injury he experienced was a limitation in the use of his previously injured leg. Initially, the cause of the injury appeared to be the fact that a football player from an opposing team had broken both bones in Mr. Leak's leg. It requires only minimal exposure to the sport of football to understand that football players injure each other on a regular basis with varying degrees of seriousness. Indeed, this appears to be part of the strategy of the sport. Thus, it was necessary for Mr. Leak to differentiate this cause from the care he received at the hospital before both criteria were satisfied. This did not occur until Dr. Bassett told Mr. Leak that the cause of his injury was the treatment he received at St. Joseph Hospital and not the initial injury.

The Court below has rejected the *Kubrick* criteria however, requiring that a plaintiff be able to differentiate immediately between the various causes of an injury and seek guidance as to potential malpractice liability. The Court below adopted the position that since Mr. Leak was dissatisfied with the care he was receiving from Dr. Adelmann, he constructively knew the cause of his injury. However, regardless of Mr. Leak's dissatisfaction with the attention Dr. Adelmann was paying to him, he also believed that the cause of his injury was his leg having been broken by an opponent's tackle. The record in devoid of any indication that Mr. Leak knew or suspected that his injury was caused by Dr. Adelmann's lack of attention prior to being told so by Dr. Bassett. Indeed, it remains unclear

whether responsibility for the malpractice rests with Dr. Adelmann or the other doctors and hospital staff who appeared from deposition exhibits to be checking him on a regular basis. (Sup. Rec. p. 110)

The running of the statute of limitations is of critical importance in thousands of legal actions. Some actions die of their own weight, but in other cases the running of the statute results in cruel injustice to otherwise blameless plaintiffs. *E.g., see* dissent in *Wollman v. Gross*, 637 F.2d 544, 550 (8th Cir. 1980). This Court took up in *Kubrick* the question of when a cause of action accrues not only to protect the interests of the United States Government, but also to rearticulate the appropriate legal standard so that both plaintiffs and defendants can act with certainty. That task was accomplished, but the decision of the Court below has injected new and inappropriate doubt into the matter.

The importance of this issue and the need to clarify the holding of this Court in *Kubrick* can be seen by considering that this Court's holding in *Kubrick* has been applied in published opinions of the Courts of Appeals in all but the Eleventh and Federal Circuits. Mr. Leak believes that the rationale he urges is supported by decisions of the Courts of Appeals in the D.C. Circuit (*Wilson v. Johns-Mansville Sales Corp.*, 684 F.2d 111 [D.C. Cir. 1982] [diagnosis of mild asbestosis did not start the clock running on subsequent distinct mesothelioma attributable to same asbestos exposure]); the First Circuit (*Galarza v. Zagury*, 702 F.2d 29 [1st Cir. 1983] [cause of action for medical malpractice arose when plaintiff was advised by a doctor six months after perianal fistulectomy that her continuous fecal incontinence resulted from a lacerated sphincter muscle incurred during the fistulectomy rather than the fistulectomy itself, even though she had complained to her doctor during that six month period]; *Fidler v. Eastman Kodak Co.*, 714 F.2d 192 [1st Cir. 1983] [cause of action for medical malpractice arose approximately 3 years after plaintiff experienced severe and unexplained headaches following a

myelogram and more than 2 years after plaintiff experienced crushing and unexplained headaches when doctor told her headaches might be caused by myelogram material remaining in her spinal column]); the Fifth Circuit (*Martinez v. United States,* 728 F.2d 694 [5th Cir. 1984] [cause of action for denial of medical treatment for prisioner's infected eye arose when prisoner was first told by medical specialist that eye was infected and blindness was permanent]; *Harrison v. United States,* 708 F.2d 1023 [5th Cir. 1983] [cause of action for medical malpractice arose only when doctor told plaintiff the cause of her painful headaches even though this happened 9 years after injury occurred and plaintiff had believed for many years that the tests were at fault]; *Lavellee v. Listi,* 611 F.2d 1129 [5th Cir. 1980] [cause of action for medical malpractice did not arise until plaintiff had reason to believe the results of surgical procedure were unanticipated]; *Waits v. United States,* 611 F.2d 550 [5th Cir. 1980] [cause of action for medical malpractice did not arise for improperly treated infection in broken hip and leg until plaintiff had knowledge of improper procedure even though plaintiff was dissatisfied with results of medical treatment and transferred to new hospital where leg amputated.]); the Eighth Circuit (*Snyder v. United States,* 717 F.2d 1193 [8th Cir. 1983] [cause of action for medical malpractice for pain resulting from unnecessary cordotomy arose when plaintiff learned that cordotomy caused pain, not when he learned cordotomy was unnecessary]; and the Ninth Circuit (*Augustine v. United States,* 704 F.2d 1074 [9th Cir. 1983] [cause of action for medical malpractice arose when plaintiff became aware of development of pre-existing problem into more serious condition]).

To the contrary, Mr. Leak believes that the Fourth Circuit (*Gilbert v. United States,* 720 F.2d 372 [4th Cir. 1983] [cause of action for medical malpractice arose when brain-injured veteran was incorrectly diagnosed incompetent by Veterans Administration and that finding was used to certify him incompetent in local court proceeding, not 21 years later when first advised by doctors that he was and always had been competent] and the Tenth Circuit (*Robbins v. United States,* 624 F.2d 971 [10th Cir. 1980] [cause of action for medical malpractice arose when plaintiff was told by doctor that marks on skin resulted from improper prescription of drug but might

not be permanent, not when plaintiff finally advised by doctor that marks would be permanent]) would join with the Seventh Circuit in rejecting his analysis.

It can be seen, therefore, that the divergence of the Seventh Circuit from the criteria articulated in *Kubrick* and the serious disagreement among the Circuits over this critical aspect of tort law necessitates further guidance from this Court.

2. The Court of Appeals Has So Far Departed From the Usual Standard In Granting Summary Judgment That This Court Must Exercise Its Power Of Supervision To Avoid the Denial Of Petitioner's Right to A Jury Trial.

Rule 56 of the Federal Rules of Civil Procedure provides that a Court may grant a motion for summary judgment if (1) there is no genuine issue as to any material fact and (2) the moving party is entitled to judgment as a matter of law. "This rule authorizes summary judgment 'only where the moving party is entitled to a judgment as a matter of law, where it is quite clear what the truth is, ***(and where) no genuine issue remains for trial***(for) the purpose of the rule is not to cut litigants off from their right of a trial by jury if they really have issues to try.' " *Poller v. Columbia Broadcasting System,* 368 U.S. 464, 467 (1962), quoting from *Sartor v. Arkansas Natural Gas Corp.,* 321 U.S. 620, 627 (1944). Further, "(o)n summary judgment the inferences to be drawn from the underlying facts . . . must be viewed in the light most favorable to the party opposing the motion." *United States v. Diebold, Incorporated,* 369 U.S. 654, 655 (1962).

Thus, the judicious application of summary judgment is necessary if Rule 56 is to coexist with the Seventh Amendment right to a jury trial as well as to serve its important procedural function. In this case, the clash between the decision of the Court below and the Seventh Amendment is clear.

The statute of limitations in question provides that a cause of action arises when a claimant

(1) "knew", or

(2) "through the use of *reasonable* diligence should have known" (emphasis supplied)

of the existence of the injury for which damages are sought. As framed by the Court below, the question before it was not whether Mr. Leak knew of the injury, but whether he "should have known" of the injury.[3] In the language of the statute, this required that he should have known of his injury through the use of "reasonable diligence". That which is *reasonable,* however, has always been the province of the jury or trier of fact, not the Court on summary judgment. The Court of Appeals, by making the determination of what Mr. Leak should have known through the use of reasonable diligence as contrasted with what he actually knew (which was the Court's province), has acted outside the bounds of Rule 56 and strayed from this Court's clear direction.[4]

The parameters of Rule 56 have been understood by other circuits which have reversed summary judgment determinations based upon the statute of limitations in a number of instances. *E.g., Williams v. Borden, Inc.,* 637 F.2d 731 (10th Cir. 1980); *Snyder v. United States, supra; Watts v. Graves* 720 F.2d 1416 (5th Cir. 1983); *Peterson v. United States,* 694 F.2d 943 (3rd Cir. 1982); *Barrett v. United States,* 689 F.2d 324 (2nd Cir. 1982); *but compare, Fidler v. Eastman Kodak Co., supra.* This should also have been the disposition by the Seventh Circuit, and it is again the responsibility of this Court to make clear that the strictures of Rule 56 and this Court's prior decisions must be adhered to if summary judgment is to pass Constitutional muster.

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[3] The Court of Appeals put it that Mr. Leak should have known that "there had been something questionable about the medical treatment" (Dec. p. 2), but since the statute speaks of injury this presumably was what the Court meant.

[4] Indeed, the error in doing so is highlighted by the decisions of the Court of Appeals and the District Court. While both these decisions focused on Mr. Leak's dissatisfaction with Dr. Adelmann and the post-fasciotomy complications in finding Mr. Leak should have been aware of the cause of his injury, it would appear that the primary negligence lay with the hospital staff and Dr. Adelmann's associate during the pre-fasciotomy period. (Sup. Rec. p. 110)

3. The Decision Below Raises Significant Obstacles To the Proper Administration Of Justice and Is Contrary to Public Policy.

The decision of the Court below, which shifts the *Kubrick* inquiry from knowledge concerning the injury and its cause to knowledge concerning the treatment, has a serious and deleterious effect on the proper administration of justice. Mr. Leak believed his doctor was ignoring him, that his toes were numb, that his cast was too tight, that emergency surgery was performed on his leg, that his leg had been banged around while returning home to Charlotte, and that his leg never regained its size and strength. He also knew, however, that both bones had been broken after he was tackled. It is undisputed, as well, that no one suggested to Mr. Leak before he went to the Duke Medical Center that what he was experiencing was the result of his treatment rather than his bad fractures.

This case should be differentiated from the one postulated in *Kubrick,* where a plaintiff is aware of the injury and its cause, but is misinformed of whether negligence is involved. *United States v. Kubrick, supra* at 124. In Mr. Leak's case, the cause of the injury was not known. Nonetheless, the Court below would seem to suggest that all patients should undergo periodic, post-treatment examinations to determine if the sequelae being experienced resulted from the original injury or malpractice in the treatment. The alternative approach would be to file a prophylactic suit if there is any doubt thereby tolling the statute. Neither alternative should be required if an injured plaintiff is to preserve his or her cause of action. Dissatisfaction with the amount of attention being paid to a patient should not be sufficient to start the statute running, even when coupled with a complication, if the public policy of lessening the number of malpractice suits, which was the rationale for the Illinois and similar statutes, is to be satisfied.

It should also be noted that this Court's concern that the period to bring suit might never expire in certain circumstances is not present in this case. Under Illinois law there is a two year statute of limitations, but also a four year statute of repose

running from the date of injury whether discovered or not. Thus, the rights of defendants and the preservation of evidence is guaranteed.

Other circuits faced with these circumstances have not found it difficult to derive a less onerous reguirement. As the Court in *Williams v. Borden, Inc., supra at* 735, quoting from *Schiele v. Hobart Corp.,* 284 Or. 483, 587 P. 2d 1010, 1014, said:

> We do not believe the legislature intended that the statute be applied in a manner which would require one to file an action for temporary sickness or discomfort or risk the loss of a right of action for permanent injury.
> The statute of limitations begins to run when a reasonably prudent person associates his symptoms with a serious and permanent condition and at the same time perceives the role which the defendant has played in inducing that condition.

In *Lavellee v. Listi, supra at* 1131, the Fifth Circuit specifically considered this question in light of *Kubrick,* and held that a cause of action accrues when a plaintiff is aware not only of the injury, but also "its connection with acts of defendant." Phrased similarly, the Ninth Circuit in *Augustine v. United States, supra* at 1078 held that accrual occurs when "the patient becomes aware or through the exercise of reasonable dilligence should have become aware of the development of a pre-existing problem into a more serious condition." *See* discussion of the semantic parameters of the problem in *Harrison v. United States, supra* at 1027.

Thus, it can be seen that the Seventh Circuit has overreached *Kubrick* by holding a cause of action accrues when a patient becomes dissatified with his or her treatment. This Court should make clear that it did not intend by its decision in *Kubrick* to impose such a burden on the administration of justice and potential plaintiffs.

CONCLUSION

For the reasons stated herein, it is respectfully requested that this Petition for a Writ of Certiorari be granted.

Respectfully submitted,

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APPENDIX

UNITED STATES COURT OF APPEALS

FOR THE SEVENTH CIRCUIT

CHICAGO, ILLINOIS 60604
SUBMITTED MARCH 29, 1984*

APRIL 12, 1984.

BEFORE

Hon. WILBUR F. PELL, JR., Circuit Judge
Hon. HARLINGTON WOOD, JR., Circuit Judge
JOHN L. COFFEY, Circuit Judge

No. 82 C 1837
No. 83-1947

CURTIS D. LEAK,
Plaintiff-Appellant,

vs.

ST. JOSEPH HOSPITAL OF JOLIET and DR. D. ADELMANN,
Defendants-Appellees.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

PRENTICE H. MARSHALL,
Judge.

O R D E R

The only issue on appeal is whether the district court was correct in granting summary judgment for defendants, finding that plaintiff's medical malpractice suit was barred by the statute of limitations.

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* After preliminary examination of the briefs, the court notified the parties that it had tentatively concluded that oral argument would not be helpful to the court in this case. The notice provided that any party might file a "Statement as to Need of Oral Argument." *See* Rule 34(a), Fed. R. App. P.; Circuit Rule 14(f). No such statement having been filed, the appeal has been submitted on the briefs and record.

Plaintiff's leg was fractured during a semi-professional football game on September 24, 1978 in Joliet, Illinois. Plaintiff was treated by defendant Dr. Adelmann at defendant St. Joseph Hospital until October 4, 1978 when he returned to his home in Charlotte, North Carolina. Plaintiff was treated intermittantly thereafter for continuing problems with the leg. On September 24, 1980, a Dr. Bassett at Duke University Medical Center suggested to plaintiff that the problems with the leg might have resulted from negligent care by defendants. On March 24, 1982, plaintiff filed suit.

Under Illinois law, which governs in this diversity case, no medical malpractice case may be brought

> more than 2 years after the date on which the claimant knew, or through the use of reasonable diligence should have known . . . of the existence of the injury. . . .

Ill. Rev. Stat. ch. 110, § 13-212. This "discovery" date has been interpreted to refer to the time at which plaintiff knew or should have known of the existence of the injury, and of the possibility that it might have been wrongfully caused. *Witherell v. Weimer,* 85 Ill. 2d 146, 421 N.E.2d 869 (1981). The question thus becomes whether plaintiff should have known prior to September 24, 1980 (when Dr. Bassett used the legal term "negligence") that there had been something questionable about the medical treatment.

There is essentially no dispute about the facts relevant to that issue: plaintiff was in great pain after Dr. Adelmann casted his leg on September 24, 1978; his toes were numb and the cast was tight; by September 29, 1978, a "compartment syndrome" had developed, and Dr. Adelmann performed a "fasciotomy," described to plaintiff as "emergency" surgery; on October 3, 1978, Dr. Adelmann surgically removed necrotic muscle tissue; throughout this period, plaintiff complained to hospital personnel about the lack of medical attention, and hospital personnel questioned some of the medical decisions that had been made; the cast was blood-soaked after plaintiff's plane trip to Charlotte on October 4, 1978; plaintiff remained hospitalized in

Charlotte until October 24, 1978; part of the muscle was destroyed, and the leg never regained its size and strength. Defendants relied on plaintiff's deposition in their motion for summary judgment, and plaintiff likewise relied on his deposition testimony in resisting defendants' motion.

On the basis of this evidence, the district court concluded that there was no factual dispute that would preclude summary judgment. As a matter of Illinois law, the undisputed facts showed that plaintiff should have known as early as October of 1978, and surely well before Dr. Bassett's "negligence" remark on September 24, 1980, that something had gone seriously wrong in the course of the treatment in Joliet.

We conclude that the district court was correct in its interpretation of Illinois law. In the absence of any disputed issue of fact, summary judgment was appropriately granted.

Judgment AFFIRMED.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

No. 82 C 1837

CURTIS D. LEAK,

Plaintiff,

v.

ST. JOSEPH HOSPITAL OF JOLIET and DR. D. ADELMANN,

Defendants.

MEMORANDUM OPINION

PRENTICE H. MARSHALL, DISTRICT JUDGE

Plaintiff Curtis D. Leak ("Leak"), a former football player, suffered a fractured left leg as a result of being tackled while returning a kickoff for the semi-professional Quad Cities Blackhawks at a game in Joliet, Illinois on September 24, 1978. He was taken to St. Joseph Hospital in Joliet ("the hospital"), where he was teated by Doctor Douglas Adelmann ("Dr. Adelmann"). In this lawsuit, filed on March 24, 1982, Leak alleges that the treatment he received at the hands of Dr. Adelmann and the hopsital from September 24 through October 4, 1978 was negligent. Defendants have filed a motion for summary judgment based on the statute of limitations.[1]

Illinois has established a two-year limitation period, subject to a statutory "discovery" rule, for medical malpractice actions:

> No action for damages for injury or death against any physician or hospital . . . shall be brought more than two years after the date on which the claimant knew, or through the use of reasonable diligence

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[1] Defendants orally waived the filing of a reply memorandum by telephoning our chambers on March 21, 1983.

> should have known, or received notice in writing of the existence of the injury or death for which damages are sought in the action.

Ill. Rev. Stat. ch. 83, § 22.1 (1981). Here plaintiff seeks to bring himself within the discovery rule. The standard for application of the rule was announced in *Witherell v. Weimer,* 85 Ill. 2d 146, 421 N.E. 2d 869 (1981):

> The statute starts to run when a person knows or reasonably should know of his injury and also knows or reasonably should know that it was wrongfully caused. At that point the burden is upon the injured person to inquire further as to the existence of a cause of action. In many, if not most, cases the time at which an injured party knows or reasonably should have known both of his injury and that it was wrongfully caused will be a disputed question to be resolved by the finder of fact. Where it is apparent from the undisputed facts, however, that only one conclusion can be drawn, the question becomes one for the court.

Id. at 156, 421 N.E. 2d at 874 (citations omitted).

Here, the key question is when plaintiff knew or reasonably should have known that his injury was "wrongfully caused." This standard does not require that a plaintiff have knowledge that an *actionable wrong* was done in order for the statute to begin running. *See Knox College* v. *Celotex Corp.,* 88 Ill. 2d 407, 415-16, 430 N.E. 2d 976, 970 (1981); *Nolan v. Johns-Manville Asbestos,* 85 Ill. 2d 161 170-71, 421 N.E. 2d 864, 868 (1981); *Bates v. Little Company of Mary Hospital,* 108 Ill. App. 3d 137, 140, 438 N.E. 2d 1250, 1253 (1982). Rather, a plaintiff is on notice that his injury was wrongfully caused when he becomes possessed of sufficient information concerning his injury and its cause to put a reasonable person *on inquiry* to determine whether actionable conduct was involved. *Knox College,* 88 Ill. 2d at 416, 430 N.E. 2d at 980; *Bates,* 108 Ill. App. 3d at 140, 438 N.E. 2d at 1253.

In support of their position, defendants rely solely upon plaintiff's deposition ("Leak Dep."). The facts established by that deposition, which plaintiff has not attempted to controvert by other evidence, are as follows. After his injury, plaintiff was transported to the hospital. Leak Dep. at 28. There, he was introduced to Dr. Adelmann. *Id.* at 35-36. He was told that he was going to have surgery done and was given anesthesia; when he woke up, his leg was in a cast. *Id.* at 36. He next saw Dr. Adelmann three days later, on Wednesday, September 27; he does not believe that any other doctors saw him on the intervening two days, although he is not completely sure. *Id.* at 40.

On the 25th, plaintiff's leg was still in pain, and the toes on the injured leg had become numb. *Id.* at 41. He complained to the nurses about the absence of a doctor and questioned why his toes were numb. *Id.* On the following day, plaintiff was still in a good deal of pain, and his toes were still numb. He asked the nurses whether Dr. Adelmann had set his leg, but he did not receive an answer. *Id.* at 42.

On the 26th or the 27th, plaintiff spoke by telephone with a Dr. Boyd, a Charlotte, North Carolina orthopedic surgeon who had treated plaintiff in the past. *Id.* at 55. Boyd told plaintiff that he would speak with Dr. Adelmann to find out what was going on. *Id.* at 55-56. Plaintiff states that he talked to Dr. Boyd about getting transferred out of the hospital, and he remembers telling him that he "want[ed] to go home because of the treatment [he] was getting from [Dr. Adelmann]." *Id.* at 101.

On September 27, Dr. Adelmann visited plaintiff, who complained of the numbness in his toes and asked why the doctor had not been in to see him and what the condition of his leg was. *Id.* at 45-46. Adelmann told plaintiff that he had fractured his tibia and fibula and that he was going to "wedge [the] cast" (this term is undefined). *Id.* at 46. He also told plaintiff that he was going to set "the big bone" on the 29th. *Id.* Dr. Adelmann chcked plaintiff's numb toes with a pin prick; plaintiff felt nothing. *Id.* at 47. The next day, the doctor was

again absent, and plaintiff again queried the nurses about his absence. He testified that on the 28th he felt that his cast was too tight and that he could not feel his toes and could hardly move them. *Id.* at 48.

Dr. Adelmann next visited plaintiff on Friday, September 29. He opened plaintiff's cast and told plaintiff that he was going to perform a fasciotomy, "to relieve the pressure that had built up." *Id.* at 49. At that time, plaintiff testified, his leg was "as big as a balloon," and Dr. Adelmann told him that the purpose of the surgery was "to make [the leg] better." *Id.* at 50.

When plaintiff awakened after the surgery, he was in extreme pain. *Id.* at 52. The following day, he was visited by some doctors other than Adelmann. They questioned why his leg was not elevated and ordered that that be done. *Id.* at 53. Plaintiff still could not feel his toes. *Id.* at 54.

Plaintiff saw Adelmann on numerous occasions while still in the hospital after surgery. *Id.* at 54. During the post-surgery period, the rest of plaintiff's leg started to become numb. *Id.*

On or about October 4, plaintiff was transferred to a hospital in Charlotte, North Carolina, *id.* at 56-57, apparently at the behest of Dr. Boyd, *id.* at 103. None of the parties has cited testimony or other evidence concerning either the reason for the transfer or any pre-transfer discussions between Dr. Boyd and Dr. Adelmann. The day after plaintiff arrived in Charlotte, Dr. Boyd examined him. He removed plaintiff's cast, which had become soaked with blood during the trip to Charlotte. *Id.* at 65, 103-04. Surgery was scheduled, and Dr. Boyd told plaintiff that "[t]his thing has gotten to the point that there is a possibility that you have got some dead tissue in there; and there's a possibility that we might have to take your leg." *Id.* at 65. The operation apparently involving performing a skin graft in the area of the fasciotomy done by Dr. Adelmann. *Id.* at 64, 65-66. None of the parties has informed us of the medical reasons for this operation.

It is unclear at present exactly what plaintiff claims was done improperly by defendants. In plaintiff's response to the

motion for summary judgment, it is suggested that the defendants' failure to properly care, treat, monitor, diagnose, and manage his condition caused him to develop a "compartment syndrome," which in turn necessitated the fasciotomy. Response to Motion for Summary Judgment at 1. In his deposition, plaintiff suggested that his current problems, which involve limited ability to flex his injured leg, loss of sensation, and pain, were a result of the fasciotomy. *See* Leak Dep. at 78-79. He also stated that a Dr. Bassett, who treated plaintiff in September 1980, told him that had his treatment at the hospital been better, the fasciotomy would not have been necessary. *Id.* at 62. It is not clear to us whether plaintiff complains of the way in which the fasciotomy was performed, or of his treatment in the hospital other than the fasciotomy, or both.

To summarize, as of October 1978, plaintiff was aware of the following. His toes had become numb after the initial surgery on his leg. He was being seen only intermittently by a doctor (less than once per day). He felt that his cast was too tight. Only a few days after the initial surgery, his leg had swelled considerably such that additional surgery was required. After the fasciotomy, the rest of plaintiff's leg started to become numb. He was transferred away from St. Joseph Hospital and Dr. Adelmann, apparently at Dr. Boyd's request and after complaining to Dr. Boyd about the apparent lack of care. On the way to the North Carolina hospital, his leg began to bleed, soaking his cast with blood. Additional surgery was done in North Carolina, after Dr. Boyd had told plaintiff that the condition of his leg had deteriorated. Plaintiff has not contradicted any of these facts. In our view, this constituted sufficient information concerning plaintiff's injury to put him on inquiry to determine whether actionable conduct was involved.[2]

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[2] Plaintiff asserts that the statute of limitations was not triggered until September 1980, when Dr. Bassett criticized the care plaintiff had received at St. Joseph Hospital. *See* Leak Dep. at 59-63; Response to Motion for Summary Judgment at 3-5. We think that the facts recited above were sufficient to put plaintiff on notice that his injury had been wrongfully caused, long before Dr. Bassett's advice. In any case, a plaintiff need not know that his injury was caused by actionable conduct in order to trigger the statute of limitations. *See* Nelson v. Jain, 526 F. Supp. 1154 (N.D. Ill. 1981) (Illinois law).

Accordingly, plaintiff's claim is time barred. Defendants' motion for summary judgment is granted.

ENTER:

Prentice H. Marshall

District Judge

DATED: April 21, 1983.